No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),
Plaintiff in Error,

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Index.

Table of Authorities.

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I.

The Facts and the Pleadings.

A. THE FACTS.

This case was submitted to the District Court upon the agreed statement of facts contained in the transcript, and, upon those facts, that court, after delivering an oral opinion, rendered judgment for the plaintiff.

Although the agreed statement of facts is brief, the following statement, in outline form, of the

salient facts will serve the convenience of the court and facilitate reference.

1. Plaintiff was a San Francisco importing merchant.

2. Defendant, a Canadian corporation, was a common carrier of goods for hire, having a place of business in San Francisco.

3. Defendant maintained an agency in Antwerp in sole charge of one Debenham, who was, and had been for seven years, defendant's European Continental Traffic Agent.

4. It was such Traffic Agent's duty, as such agent, to receive at Antwerp shipments of goods intended to be carried by defendant, subject to customs regulations, and to give directions to the Government Authorities at Antwerp as to shipping the goods on defendant's chartered steamers connecting with its railroad at Montreal.

5. Plaintiff arranged with defendant, at San Francisco, that Debenham, on behalf of defendant, for an agreed rate of freight, was to receive, at Antwerp, all shipments consigned to defendant for carriage from Antwerp to San Francisco. Such shipments had been received by Debenham, and forwarded to San Francisco, for five years prior to the shipment of the thirty-six tubs of cheese here in suit.

6. On May 17, 1901, in answer to inquiries from Oswold Roth, the shipper of the goods in contro-

versy, Debenham wrote him: "Please prepare the cheese so that it may arrive here towards the end of the month; for very probably there will be a sailing for Montreal by the end of the month or on one of the first days of June. I shall have definite news tomorrow or day after, and meanwhile await my advices before shipping."

7. On May 20, 1901, Debenham wrote to said shippers: "Confirming mine of the 17th inst. I take pleasure in advising you that the Steamer 'Sardinian Prince' will sail on June 5, and I request you therefore to forward to me the lot of cheese to 'Antwerp South Transit' station to arrive not later than June 3."

8. On May 22, 1901, Debenham advertised in an Antwerp daily paper, as agent of the Canadian Pacific Railway Company, that the Steamer "Sardinian Prince" would sail on June 5, 1901.

9. On May 24, 1901, Debenham wrote to said shippers: "Please let me know by return mail if you will act on my letter of the 30th inst."

10. On May 25, 1901, the goods in question were loaded on a car at Uster consigned to forwarders at Bale.

11. On May 28, 1901, the car containing the goods arrived in Bale and was forwarded to Debenham, who was the consignee in the way bill for the shipment.

12. On May 29, 1901, the car containing said goods arrived at the Belgian frontier, and was re-

ceived by the Belgian State Railway, which took it to Antwerp.

13. On May 30, 1901, the car containing the goods arrived at Antwerp.

14. Debenham was at once notified of the arrival of the car in Antwerp, by the railway authorities, who delivered to him the way bill which accompanied the shipment.

15. Debenham then had the option:

(a) Of directing the officials to take the goods directly to the ship on which they were to be loaded.

(b) Of directing the officials to take the goods to the wharf, there to remain until he should direct them to be placed on board the ship.

(c) Of directing the officials to take the goods to the Customs Warehouse (Entrepot Royal) there to remain until he should direct them to be removed and taken to the ship.

(d) Of paying to the Belgian Government the charges and duties due on the shipment and so dispensing entirely with further customs surveillance.

16. Debenham directed the officials to take the goods to the Customs Warehouse (Entrepot Royal), the ship not being ready to receive them.

17. On June 1, 1901, pursuant to said directions of Debenham, the goods were unloaded and stored in the Customs Warehouse (Entrepot Royal).

18. Upon receipt of the goods in the Entrepot Royal, the customs authorities delivered to Debenham a document called "Acquit de Transit", which he was to keep until he desired the goods to be removed from the Entrepot Royal to the steamer, and then re-deliver to them whenever he wished to embark the goods on shipboard; whereupon the customs officials would issue to him a "remise au depart" (release for departure) and send the goods to the deporting steamer.

19. On Saturday, June 1, 1901, the steamer "Sardinian Prince" arrived in Antwerp, and on Monday, June 3, 1910, she began to load her cargo.

20. On June 5, 1901, at 2:36 P. M. an accidental fire destroyed the Entrepot Royal and the goods.

21. Debenham did in fact secure a "remise au depart" for the goods before their destruction.

22. Debenham paid the Customs Warehouse (Entrepot Royal) warehouse charges.

23. The transportation charges from the Entrepot Royal to the steamer would have been payable by Debenham, and ultimately charged to the shipper.

B. THE PLEADINGS.

By reference to the pleadings, it will be seen that the facts in the agreed statement are in strict accord with the facts alleged in plaintiff's complaint; and,

in the light of the agreed statement of facts, the only issue presented by defendant's answer to the complaint is whether or not the goods in question had been delivered to and accepted by defendant for immediate transportation, prior to their destruction by fire.

It will be noted that, while the answer asserts that the San Francisco agreement contained conditions that no shipment would be received at Antwerp except when placed alongside of ships, to be designated by the defendant, then and there ready to take such shipments on board, and that defendant should not be liable for any damage to or destruction of shipments by fire, either on sea or land, nevertheless those affirmative allegations are wholly unsupported by the agreed statement of facts, and hence remain unproved.

As intimated above, the sole issue presented by the pleadings and the agreed statement, is, as pointed out in the opinion of the Hon. Wm. C. Van Fleet (Transcript 27, 29), whether or not there was a delivery of the goods in controversy to defendant for transportation prior to their destruction—whether they were, at that time, in its possession as a common carrier rather than as a warehouseman.

II.

Defendant's Liability as a Common Carrier.

A. DEFENDANT, AS A COMMON CARRIER, WAS LIABLE FOR DESTRUCTION OF THE GOODS BY FIRE.

This proposition is so elementary as to require no consideration; and, in fact, it is admitted by defendant.

The whole case revolves upon the single question, considered under the next heading, whether the goods, at the time of their destruction, were in the possession of the defendant as a common carrier. Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not.

B. DEFENDANT'S LIABILITY AS A COMMON CARRIER COMMENCED ON DELIVERY OF THE GOODS TO, AND ACCEPTANCE THEREOF BY, IT FOR IMMEDIATE TRANSPORTATION.

The law is well settled as to when the liability of a common carrier of goods commences:

> "The liability of the common carrier commences whenever, and as soon as the goods have been delivered to and accepted by him solely for transportation, although they may not be put immediately in itinere, but are, at first, *for his own convenience and preparatory to the voyage for which they were intended,* temporarily deposited in his wharf or store-room. In such case the deposit is a mere accessory to the carriage, and does not postpone his liability as a common carrier to the time when

they shall be actually put in motion towards their place of destination."

Hutchinson, Carriers, Sec. 113.

"The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception, when they are in fit and proper condition and ready for immediate transportation. If a common carrier receives the goods into his own warehouse for the accommodation of himself and his customers, *so that the deposit there is a mere accessory to the carriage,* and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods."

Moore on Carriers, 1st Ed., page 130.

"When the goods are detained or delayed awaiting shipment, through the carrier's act or to suit its purpose or convenience, *and not on account of or by the request or act of the owner or shipper,* the relation and liability is that of a common carrier, and not of a warehouseman."

Moore on Carriers, 1st Ed., page 260.

"The responsibility of a common carrier, therefore, is fixed by the acceptance of the goods, whether the acceptance be in a special manner or according to the usage of his business."

Angell on Carriers, Sec. 140.

See also

Authorities in defendant's brief, pp. 13-17.

Even where the carrier is also engaged in the business of warehouseman:

> "In such a case, it is well settled that if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, *if they are deposited for the purpose of being carried without further orders,* the responsibility of the carrier begins from the time they are received: Angell on Carriers, secs. 75, 131. So of an innkeeper, who is also a carrier by land; if he receives goods into his inn to be carried, he is liable as a carrier for any loss which may happen before they are put in transit: Id. sec. 133; Hyde v. Trent etc. Nav. Co., 5 T. R. 389."
>
> *Blossom v. Griffin,* 13 N. Y. (3 Kernan) 569.

See also

> *Wade v. Wheeler,* 3 Lansing (N. Y.) 201.

And, of course, it is immaterial whether the carrier deposits the goods in his own warehouse or in that of a third party, for the carrier's convenience, or as an accessory to the carriage. This is made very clear in a thoroughly considered case, in which cotton had been delivered to a compress company employed by the defendant carrier:

> "* * * for there was other evidence from which the jury might have found that the employment of the compress company was for the purpose of facilitating the transportation by reducing the bulk of the cotton, and was an expedient whereby the railway company could more easily earn the stipulated freight than if it should transport it in its larger bulk. *If it was done for the convenience of the railway*

> *company, or mainly for its convenience,* it surely would not be unreasonable to find that during the time the compress company had the possession it was holding it *as agent or employe of the railway company.*"
>
> *Southern Railway Co. v. Hubbard Bros.,* 146 Fed. 31 (C. C. A.) (Appendix A).

See also

> *Otis Company v. Missouri Pac. Ry. Co.,* 112 Mo. 622.

On pages 17 and 18 of its brief respondent seems to contend that a deposit of goods is to be deemed accessory to the carriage of them, only when the deposit is in the carrier's "own warehouse or place of keeping." This is not sound, and is refuted by the above cases. If a carrier's own warehouse is full, and for its own convenience it has goods, delivered for immediate carriage, deposited in another's warehouse, paying for the privilege, there can be no doubt that such deposit would charge the carrier as effectively as if it had been made in its own warehouse. And whether the depository selected by the carrier be the warehouse of a private third party or of a public third party is not material.

In the case at bar the carrier's own "place of keeping" (the "Sardinian Prince"), was not conveniently ready to receive the goods; therefore the carrier, for its own convenience, elected to deposit them in the Entrepot Royal, and pay therefor.

But it could not, and did not, by so doing, divest itself of its obligation as a common carrier.

We now proceed to consider the facts in the case at bar, and to show that they clearly show a delivery of the goods to the defendant for immediate transportation, which is far within the limits of the test prescribed by the above authorities.

1. *The goods were* DELIVERED *to defendant as a common carrier for immediate transportation prior to their destruction by fire.*

(a) Debenham was the "European Continental Traffic Agent of defendant. It was his duty "to receive at Antwerp * * * shipments of merchandise coming there in bond for export," and "*intended to be transported* by said defendant carrier". By the agreement made between plaintiff and defendant at San Francisco it was particularly his duty "to receive and *cause to be embarked* at Antwerp * * * all the shipments of merchandise consigned to defendant *for carriage* from Antwerp to San Francisco."

It was no part of Debenham's duty to shippers in general, and it was wholly contrary to his duty to plaintiff under the San Francisco agreement, for him to receive goods for *storage* or *warehousing.* He could not receive goods except such as were *"intended to be transported"* or *"for carriage.* He was not to receive goods and cause them to be warehoused; he was "to receive and *cause to*

be embarked". When any shippers sent him goods, such was his custom and authority that they could only intend that it was for immediate carriage. If goods were warehoused, it was for the defendant's own convenience and purposes, as is shown beyond question by the fact that any *warehouse charges were payable by Debenham,* and not recoverable from either shippers or buyers. Transportation charges, on the contrary, both from Antwerp to San Francisco, and from the Customs Warehouse (Entrepot Royal) to the ship, were payable by the shippers or the buyers. This fact is conclusive proof, that, when goods were deliver to Debenham at Antwerp, it was solely for *immediate carriage,* since, if he chose, for the defendant's convenience or purposes, to store them, the expense of so doing was payable by him as agent of defendant—was just as much an expense of transportation upon defendant, *in earning its freight,* as would have been the cost of renting a freight car from a third party (see *Wade v. Wheeler,* 3 Lans. (N. Y.) 201).

Referring now to the particular goods here in suit: Debenham's letters to the shippers, of dates respectively May 17 and May 20, 1901, in answer to their inquiry of May 11, 1901, very obviously request the cheese to be forwarded to him, not that it may be warehoused, but *that it may be shipped* —"for carriage". In the first letter he asks that it be prepared so that it will arrive near the end of the month, *because* there will probably be a

sailing. So concerned is he that the cheese shall be sent "for carriage" that, in the same letter he instructs the shipper to "await my advices before shipping." In the second letter he advises the shippers that the vessel "will sail on June 5, and I request you *therefore* to forward to me the lot of cheese." He impressed it upon the shipper that defendant was not soliciting goods for warehousing, but "for carriage", and that it desired as small a lapse of time between receipt of the goods for carriage and the loading of them as it was possible to secure. This, no doubt, was due to the defendant's desire to avoid paying warehouse expenses and to save all possible expense in earning its freight. The advertisement which Debenham placed in the Antwerp daily paper solicits goods to be delivered "for carriage" and not for warehousing. The waybill indicated that the shipment was in bond "*in transit to the United States*". It is very apparent that both defendant and the shippers contemplated and assumed that the goods were to be *continuously in transit,* and never out of it for warehousing purposes; and this assumption on the shippers' part was rooted in the conduct and representations of the defendant. Neither defendant nor shippers, at any time, contemplated any relationship of defendant to the goods other than that of common carrier. The reason why the goods were warehoused is stated in defendant's brief, page 28, to be that "the ship was not ready to receive the goods, and, *therefore,* it became the

duty of Mr. Debenham to indicate whether the goods were to be detained * * *."

That the goods were, in fact, delivered to defendant by delivery to its authorized agent, Debenham, seems evident. They were consigned to him in the way bill covering the transit from Bale to Antwerp, in accordance with the arrangements between plaintiff and defendant. On May 30, 1901, the goods arrived in Antwerp, and the station authorities notified the consignee, Debenham, of their arrival. Down to this point there had been no delivery to defendant or Debenham; and, rightfully or wrongfully, he might have refused to have anything to do with them, passively leaving them with the next preceding carrier.

(b) But then, on the same day, the railway authorities *"delivered to him the way bill accompanying the shipment."* The way bill gave Debenham the right to place the goods on board his ship at once, or to have them placed on the wharf, or to have them warehoused, in any of which contingencies he would have to pay no duty (Tr. 18, 19). And Debenham, of course, like any consignee of goods, had another alternative: to pay the duty on the goods, whereupon he could have withdrawn them wholly from all customs surveillance, without placing them on ship board. He then had the power to control the disposition of the goods in accordance with the business arrangements of defendant. The shipper of

the goods had done all that he was requested to do by Debenham, in the letter of May 20; had parted with the control of the goods, and had placed them in the exclusive care and control of Debenham and defendant in a foreign country, where, so far as appears, the shipper was wholly unrepresented. (See *Hutchinson,* sec. 141; *R. R. Co. v. Manufacturing Co.,* 16 Wall. 327, quoted infra). The goods were ready for immediate transportation; the shipper had no possible reason for desiring them to be stored or delayed; and any storage or delay was purely for the convenience and purposes of the defendant and a mere accessory to the carriage, contrary to the shipper's reasonable expectations, and, it must be assumed, against his desires. Debenham now had the right, the power and the duty to control their disposition without consulting the shipper. The manner in which he disposed of them was wholly independent of any control of the owner or shipper, and was dependent solely upon the business convenience and pleasure of the defendant. There had been a complete delivery to defendant as a common carrier, through its Traffic Agent, Debenham.

See

North German Lloyd S. S. Co. v. Bullen, 111 Ill. App. 426 (Appendix B);

Aetna Ins. Co. v. Wheeler, 49 N. Y. 616;

Wade v. Wheeler, 34 Lansing (N. Y.) 201;

Blossom v. Griffin, 13 N. Y. (3 Kernan) 569.

(c) But, even assuming that the delivery of the way bill to Debenham did not, of itself, constitute a delivery to the defendant; nevertheless, when he directed the officials to take the goods to the Customs Warehouse—so exercising his *jus disponendi* over them, there was, without doubt, a delivery to him. Had he been the buyer and ultimate consignee of the goods, that act of dominion would surely have constituted a delivery to him, relieving the former carrier of all further responsibility, and satisfying the shipper's obligation to him. And, equally, it constituted a full delivery to defendant, for carriage, through Debenham.

(See cases heretofore cited.)

(d) Assuming further, however, that the delivery of the way bill and the act of dominion under (c) did not, even together, amount to a delivery to Debenham; yet, when, on his order, the goods had been deposited in the warehouse, on June 1, 1901, *the very day upon which, at noon, the ship arrived in Antwerp,* and he received from the warehouse the "Acquit de Transit", there was a delivery to him and to defendant.

(See cases heretofore cited.)

(e) Assuming yet again, that, even down to this point, there had been no delivery; certainly when Debenham, after the arrival of the ship in Antwerp, surrendered the "Acquit de Transit", which operated as an instruction to the customs officials to send the goods to the departing steamer,

and received, in exchange, the "remise au depart" *and paid the warehouse charges,* there can be no doubt but that the goods had been delivered to him, as agent of the defendant. By paying the warehouse charges, he admitted that the goods had been delivered, and that they had been stored to suit defendant's convenience. (See *Wade v. Wheeler*). Not only had they been delivered to defendant, but, through Debenham, it had actually exercised its *jus disponendi* at least twice. No word had been sent to the shipper that defendant refused to accept the goods, and the shipper did not know but that they were on board the ship. He was justifiably and naturally resting assured that the goods were in their continuous transit to San Francisco.

See

Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. App. 386 (Appendix C);
C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285;
Hutchinson, sec. 755.

These several acts of Debenham will be further discussed under the subsequent headings; but it is submitted that, to this point, it has been conclusively demonstrated that there was a *delivery* of the goods to the defendant as a common carrier, for immediate transportation, prior to their destruction by fire in the warehouse in the middle of the afternoon of June 5, 1901—*the very day upon which defendant, in the letter of May 20 and the*

newspaper advertisements, had represented that its ship, for which it had solicited the goods, would sail.

(f) We have no disagreement with the principles relating to delivery for carriage expressed in defendant's authorities cited in its brief under heading I, pages 12 to 20; but we do disagree with the construction placed upon some of those authorities by defendant, and with the manner in which defendant applies them to this case.

On page 14, in a quotation from Hutchinson, Sec. 4, the word *"law"* is emphasized as one of the causes of loss against which a common carrier is not an insurer. That exception has no bearing in the case at bar, for by no possibility can it be said that the loss here in question was *caused by the law*. Nor is this a case subject to the application of the principle, quoted from the same author, on page 32; for the goods here, so far from being "taken out of the carrier's possession" by legal process, were, by the carrier, *voluntarily delivered to the customs authorities for the carrier's convenience*. The Belgian Government had no desire to be troubled with the surveillance of these goods; it was ready and willing—indeed desirous—that defendant should take the physical custody of them *at once*. There was never any order or process of the Belgian Government which prevented or delayed the transit of the shipment for an instant.

As to the excerpt from *Moore on Carriers,* defendant's brief, page 14, we desire not only to express our assent to the proposition as stated, but to particularly call to the attention of the court the fact, there expressed, that a carrier is an insurer of property "*while in its custody* OR *under its control* as a common carrier." So, though the physical *custody* of the property may be in another, if it is *under the control,* or *in the legal possession* of the carrier, the carrier occupies toward it the relation of insurer.

The principle expressed in Hutchinson, page 101, defendant's brief, page 14, is correct; but it is to be borne in mind that the carrier becomes responsible as an insurer when, *in the contemplation of the law* there has been a delivery to and an acceptance by it. It is not for the carrier to say that there has or has not been a delivery or an acceptance; *for if the law says there has been,* it is not material what view the carrier may take of the transaction.

The quotation from Hutchinson, Secs. 105 and 82, defendant's brief, pages 14 and 15, is also unobjectionable when properly construed as a whole. It is true, as there expressed, that the delivery to the carrier "must be complete, so as to put upon him the exclusive duty of seeing to their safety," but the word "exclusive", as appears from the paragraph as a whole, is used merely with respect to *the carrier's relation to the shipper.* In other

words, the word "exclusive" as here used means only that the duty referred to must rest wholly on the carrier *as between the carrier and the shipper,* and that no such duty must remain on the shipper. This excerpt does not contemplate, at all, any custody or supervision by servants of the carrier, or by customs authorities, of goods in the legal possession of the carrier. And, in any event, Debenham, in the case at bar, had the exclusive duty of seeing to their safety; the Belgian customs authorities had *only the duty of seeing that they were not disposed of contrary to the Belgian revenue laws.*

These remarks apply also to the paragraphs quoted from Moore, defendant's brief, page 15, from Hutchinson, defendant's brief, pages 15 and 16, and from the Nebraska case, defendant's brief, pages 16 and 17. The words "exclusive control" and "entire custody" have reference to the control or custody *as between the carrier and the shippers, and have no relation to any custody, control or supervision by a third party.*

Referring to the italicized passage from Angell, Sec. 140, defendant's brief, page 15, it is submitted that the facts here involved show, with unusual clearness, the intention on the part of the shipper "to trust the carrier with the custody of the goods"; and, in addition, that the carrier, for its own convenience, saw fit to *delegate such custody* to the Belgian customs authorities (see Hutchinson, Sec. 141).

The facts here show a delivery by the shipper to the carrier, which was *"in legal effect a complete surrender to him of possession and custody"*, as herein pointed out. These facts, therefore, exactly meet the requirement quoted from Hutchinson, defendant's brief, page 16; they also square perfectly with the requirement that "all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished", defendant's brief, page 16. *There was absolutely nothing remaining for the shippers to do,* in connection with the goods in question, after they left Ulster; they had perfected all arrangements for the passage of the goods through to Antwerp and delivery there to the defendant. Had no fire occurred, or had the goods not been placed in the Entrepot Royal, the shippers would have done no further act toward their delivery to defendant. Had it not suited the *convenience of the defendant* to place the goods in the Entrepot Royal, they never would have entered it.

The test of whether or not the shippers have abandoned all control over the goods, and there has been a delivery to the carrier, is well phrased as follows:

> "* * * It will be found ordinarily to resolve itself into the inquiry: whether the owner of the goods did all to effect a secure delivery to the carrier which it was reasonable to expect a prudent man to have done under the circumstances."
>
> *2 Redfield on Carriers,* 70.

There was no *conditional* surrender by the shipper, but an *absolute* surrender. The acceptance by the defendant was also *unconditional.* And it is again to be noted that the quotation from the Nebraska case, defendant's brief, page 6, relates only to an unconditional surrender *as between shippers and carrier; and does not involve any question of customs supervision.*

Referring to the quotation from Moore, defendant's brief, page 15, it is to be remarked that the requirement there phrased is that "it is essential that the property should be placed in such a position that it *may* be taken care of by the agent or person having charge of the business of the carrier." Such person, in the case at bar, was Debenham; and the shipment was placed in such position that it "*may* be taken care of" by him. *And he did, in fact, take care of it.*

It is also to be noted that Moore recognizes that it is not essential that there should be an *actual* delivery, as he points out that a *constructive* delivery is sufficient. In the present case there was more than a constructive delivery; there was an *actual delivery in fact,* and if defendant's possession later became constructive, it was for its own convenience and by its own act.

The excerpt from the case of *H. L. Edwards & Co. v. Texas Midland Co.,* defendant's brief, page 17, also shows, as does the quotation from Moore, above mentioned, defendant's brief, page 14, that "it is not necessary that the carrier must have *both*

possession *and* control of the goods at the time of their destruction, but possession OR control." As shown herein, the carrier in the present instance had *both* the *legal possession and control* of the goods when they were destroyed by fire, at which time they were not only constructively, but actually in transit. The shippers had neither, nor even *custody,* and the Belgian customs officials had only the *nakel physical custody, without either possession or control;* and this bare physical custody they held on defendant's request and for its benefit.

Nothing in this case "required either by law or the contract remained to be done by the shipper" (defendant's brief, page 18) at the time when the fire took place. Prior to that time the goods had been delivered into the "exclusive control of the carrier and accepted by the latter in that character for transportation" (defendant's brief, page 17).

The case of *St. Louis etc. Ry. v. Commercial Ins. Co.,* 139 U. S. 223, 237, quoted from in defendant's brief, page 18, is not analogous to the case at bar; for there the carrier had *in fact* assumed no custody or control *of any of the cotton nor of the place where it was kept* by the Compress Company. It had *done no act whatever* with relation to the cotton in question:

> "This cotton, certainly, was in the exclusive *possession and control* of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no

> *custody or control* of it, *and no possession of it, actual or constructive;* and *no hand in placing or keeping it where it was.*"
>
> *Id.* at p. 237.

On the other hand, another case involving a Compress Company, decided by the Circuit Court of Appeals for the Sixth Circuit *fifteen years later* than the above case, presents facts quite analogous to those here involved, and is decided in accordance with our contentions. The case referred to is *Southern Railway Co. v. Hubbard Bros.,* 146 Fed. 31 (1906) (Appendix A). To the same effect is the case of *Otis Company v. Missouri Pacific Ry. Co.,* 112 Mo. 622.

2. *The goods were* ACCEPTED *by defendant as a common carrier for immediate transportation, prior to their destruction by fire.*

It has been shown that the goods were delivered to defendant as a common carrier for immediate transportation, and, incidentally, that they were by defendant accepted for that purpose. We now consider that acceptance more particularly.

When the goods arrived at Antwerp and Debenham was notified of that fact, rightfully or wrongfully, he might have refused to accept them, notwithstanding his letter of May 20th, and the advertisement. It is conceivable that, disregarding his own solicitation of the goods, he might have wired to the shipper, "I am not ready to receive

these goods as yet as a common carrier; therefore you must continue to control them and dispose of them as you deem best until they are actually on board our ship." And had the shipper, on receipt of that information, taken control of the goods, by accepting the way bill, it could not be contended that there was any acceptance of them by the defendant. The *jus disponendi* would have been in the shipper. *But Debenham took no such course.* Had he done so, the shipper might have chosen to leave the goods in the custody of the Belgian railway, or he might have chosen the wharf instead of the Entrepot Royal as a place of deposit, in which case the goods would not have been destroyed. Or the shipper might have chosen to pay the duty and place them elsewhere, free of all customs surveillance. On Saturday, June 1, 1901, *the ship having arrived at noon,* the shipper might have chosen to have them placed on board at once, *instead of unloading and storing them, on the same date.* The shipper might well have elected to load them on board on Sunday, or Monday, or Tuesday, or Wednesday, instead of allowing them to lie in the warehouse.

And at the least, the shipper, being so informed that defendant, contrary to its solicitations, refused to accept the goods, would have had the opportunity of procuring insurance against loss by fire during the delay of the goods in Antwerp, *and so filling in*

the gap left by defendant's withdrawal of its contemplated common carrier's liability.

See

Hutchinson on Carriers, Sec. 755;

Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. App. 386 (Appendix C);

C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285.

But the shipper was not given the opportunity of doing any of these things. On the contrary he supposed, and correctly, that the goods were in continuous transit, and that he was amply insured by the common carrier's liability.

> "There is a clear *distinction* * * * between property in a situation to be delivered over to the consignee on demand and *property on its way to a distant point to be taken thence by a connecting carrier.* In the former case it may be said to be awaiting delivery; in the latter to be *awaiting transportation.*"
>
> *R. R. Co. v. Manufact'g Co.,* 16 Wall. 327.

> "The owner of goods who delivers them under a contract of shipment to a carrier for transportation over two or more connecting lines *does not contemplate a contract of storage. His contract is for carriage,* and until the goods reach their final destination, he has a *right to continuous carrier's duty and responsibility, which cannot, without his consent,* be changed to the duty and responsibility of a warehouseman, however convenient such a course may be for the carrier. *Wehman v. Ry.,* 58 Minn. 22; 59 N. W. 546."
>
> *Hutchinson, Carriers,* Sec. 141.

> "The owner *loses sight of his goods* when he delivers them to the first carrier and has no means of learning their whereabouts till he or the consignee is informed of their arrival at destination. At each successive point of transfer from one carrier to another they are *liable to be placed in warehouses,* there perhaps to be delayed * * * and *exposed to loss by fire or theft, without fault on the part of the carrier* or his agent * * *. As a general rule the storing of the goods under such circumstances should be held to be a *mere accessory to the transportation,* and *they should be under the protection of the rule* which makes the carrier *liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route.*"
>
> *Hutchinson, Carriers,* Sec. 141.

Even had the shipper been present and noted every move made by Debenham, his conviction would only have been confirmed. For Debenham, so far from refusing to accept the goods until his ship was ready, *took the way bill,* the symbol of the goods. This was an acceptance, under his duty and his solicitations, for carriage (*Wade v. Wheeler; Aetna Ins. Co. v. Wheeler, etc.*). Having the duty to accept only for carriage, and having requested the goods for that purpose, any acceptance by him, in the absence of notice to the shipper to the contrary, could be, and was, for no other purpose. If the vessel which was to carry the goods from Antwerp had been ready to receive them, Debenham could have at once ordered them on board.

If he or his ship did not then take immediate physical custody of the goods, it was simply because it was not convenient for defendant to so do. He immediately had full control over the goods, save that they were, at his option, under the surveillance of the customs authorities for the purpose of preventing disposition of them in Belgium without the payment of duties. Not being ready to place the goods immediately on the ship, *Debenham gave orders for warehousing them.* Having accepted the way bill, which gave him control of the goods, he thus deliberately exercised that control. The goods were never, against his will, taken out of his hands by the customs officials. On the contrary, wholly in accordance with his will and upon his voluntary exercise of it, the goods were placed in the Entrepot Royal, as he directed. *He was dealing with them in a manner absolutely inconsistent with non-acceptance.* Apart from the powers to accept them immediately and bodily on board of his ship, and the power to pay the duty and take them from all customs surveillance on land (both of which he *voluntarily* chose not to exercise), he had the choice of several modes of disposing of them, while on Belgian soil, under customs regulations. After he had elected to accept the way bill, and not to leave the goods in the custody of the Belgian railway to be disposed of as it saw fit, he had the option of directing the officials to take them to one place or another place, according as he desired. In either case they were to

remain in the place to which he directed them only *"until such time as he should direct them* to be taken to the ship" (or, of course, until such time as he should pay the duty), which means *until such time as it should suit the convenience of the defendant* to itself take actual and physical custody of them. As it was not convenient for defendant's ship then to receive the shipment, Debenham, in the free exercise of his opinon, directed the officials to take it to the Entrepot Royal, and to keep it there "until he notified the customs authorities that the vessel which was to receive the shipment was ready to receive and embark the shipment for export." *When* that time would arrive depended entirely upon the business arrangements and business convenience of defendant. The point of time when defendant could itself take physical custody of the goods *could be fixed at its own pleasure.* No one, not even the customs officials, had any control over the defendant in fixing the moment when defendant would itself assume physical custody; for whenever the customs authorities were notified by Debenham to that effect, it was their *"duty"* to transport the shipment from the Entrepot Royal to the point selected by Debenham. "* * * persons standing in a relationship * * * such as Debenham occupied to the shipment in controversy, had the *right* to direct such Governmental customs authorities *when* and *where* such shipments should be delivered for deportation."

When, therefore, "Debenham directed the railroad customs officials to take the goods to the Customs Warehouse of the Belgian Government at Antwerp, called the "Entrepot Royal" (assuming that his acceptance of the way bill had not constituted an acceptance of the goods), he accepted possession of the goods for defendant *in the manner and at the time which best suited defendant's convenience.* He could have exercised his right of possession, without surveillance, by keeping them in the custody of defendant's ship, or by paying the duty and keeping them where he pleased, if the convenience of defendant had not dictated that he surrender the temporary physical custody thereof to the customs authorities, *with a continuous right and power to recall the goods into its own physical custody at any moment.* By directing the goods to be taken to the Entrepot Royal, if not on his acceptance of the way bill, Debenham accepted delivery of the goods for defendant; thereafter they were continuously in the legal possession of defendant, and the fact that defendant, for its own convenience, delegated the physical custody of them temporarily to some one else who had a convenient warehouse, did not deprive defendant of the legal possession. While possession is often accompanied by physical custody, the fact that the physical custody is in one party does not militate against the fact that the possession, with its concomitant responsibilities and benefits, is in another party; and this applies particularly to the present case,

where the defendant parted with the physical custody *only for its own convenience, and could reacquire it at any time and place, at its own pleasure.* For an obligor cannot, for his convenience, shift an obligation of his own to another without the assent of the obligee.

And not only did Debenham, after accepting the way bill, direct the goods to be taken to the Entrepot Royal; he accepted the "Acquit de Transit"; and thereafter he presented this document to the authorities, who thereupon delivered to him a " 'remise au depart' (release for departure)", which he accepted. And, by presenting to the authorities the "Acquit de Transit", he directed that the goods be taken to the steamer, since, upon such delivery of the "Aquit de Transit", the authorities "would issue a 'remise au depart' (release for departure)" *and send the goods to the departing steamer.* Thus, from the time he accepted the way bill to the time the goods were destroyed, Debenham voluntarily had the *jus desponendi* over them, and continuously exercised it. Had defendant been the buyer and ultimate consignee of the goods, as remarked before, it could not be doubted that these acts would have constituted an acceptance of the shipment by it, relieving the former carrier of its common carrier's liability and placing all further risk upon defendant. Had such been the case, defendant would have been its own insurer; but, the goods having been delivered for immediate carriage, defendant, as a common carrier, imme-

diately upon such acceptance, became plaintiff's insurer.

Debenham did not, in his letters of solicitation, request the shipper to ship the goods to a warehouse in Antwerp, nor to anyone as agent for a warehouse, but "to send *me*", to "forward *to me.*" There was never any agreement or understanding, express or implied, that he should warehouse the goods at any time. The whole course of dealing between the parties, as remarked under the discussion of the delivery to defendant, negatives any understanding other than that the goods were accepted for the sole purpose of *immediate carriage.* The warehousing of the shipment at Antwerp was a mere incident of receiving them in one of the ways in which defendant could receive them under the revenue laws of Belgium; *it was purely accessory to their transportation on defendant's lines.* After Debenham received the way bill there was nothing further to be done either by plaintiff or the shipper. The latter had sent the goods consigned to Debenham, in accordance with his request. They arrived within the time specified—"not later than June 3". The agreement to carry them certainly implied an agreement to accept them for carriage within that time. When they arrived, on May 30, Debenham was bound to accept them exclusively *for transportation.* No matter what method he then pursued, for defendant's convenience, in accepting them, they were now entrusted to defendant *for transportation.* Whether they were at once

placed in the hold of the "Sardinian Prince" or whether they were deposited on the wharf awaiting the arrival of that ship, or detained on the wharf until the arrival of another ship, or a second voyage of the "Sardinian Prince", or whether they were taken to a warehouse, public or private, *their transportation over defendant's routes had commenced.* If defendant, for its convenience or business pleasure, chose to have them journey to the Antwerp warehouse and then, figuratively speaking, "mark time" therein on the way to their destination, they were none the less traveling on the voyage from Antwerp to San Francisco, under the care and in the possession of defendant. Debenham was not detaining the goods in the warehouse for further directions to be received from the shipper or from plaintiff; for, as far as they were concerned, the shipment was launched en route to its destination, entrusted to the care of *carriers for transportation.* There had been a delivery and an acceptance, not for future carriage, but for *immediate carriage.*

3. *The goods were delivered to, and accepted by, defendant* ACCORDING TO THE CUSTOM AND USAGE OF THE PORT OF ANTWERP.

Bearing in mind the several courses which were open to Debenham on arrival of the goods in Antwerp, viz:

(a) To passively leave them in the hands of the preceding carrier;

(b) To pay the duty and do with them as he pleased;

(c) To load them at once on shipboard;

(d) To have them taken to the wharf;

(e) To have them taken to the warehouse;

it is very evident that, in choosing the last method, he, as agent for defendant, accepted them in the, or a, customary and usual way in which such goods were ordinarily accepted at Antwerp under similar circumstances.

> "No rule is better settled than that delivery must be according to the custom and usage of the port."
>
> *Constable v. National Steamship Co.,* 154 U. S. 51 at 63.

See

> *Angel on Carriers,* Sec. 140 (defendant's brief, p. 15).

In that case goods which had arrived in a steamer in New York were still on the wharf, subject to the customs regulations, and were destroyed by fire. Both the opinion of the court, and the strong dissenting opinion, take it for granted that the goods were, under such circumstances, in the possession of the company holding them, subject to the customs surveillance, as a carrier.

In *The Seguranca,* 68 Fed. 1014, oil was to be delivered by the carrier in lighters at Rio "at shippers risk", and the local regulations *required it to be placed in the custody of customs house offi-*

cers until the duties were paid. Judge Brown held that, under the regulations and customs of the port of Rio, the ship had delivered to the consignees when it had placed the oil in lighters, *in the hands of the customs authorities.* He points out that, not only had the parties expressly agreed that the lighterage should be at "shipper's risk", but that the ship *"had no control over the custody or delivery"* of the oil when it had been turned over to the customs authorities. The control over such custody, and the delivery of the oil, was in the consignees, who had the control over both the *custody* of the oil, and over its *delivery.* In short, it is obvious from the opinion that the consignees had the *legal possession* of the oil in that case, as distinguished from the *bare custody* of it, which was in the customs officials. There the consignees could terminate that custody at any time and procure delivery at any place they desired. They were in precisely the relation to the oil that Debenham was to the cheese. From Judge Brown's careful opinion it is clear that had the ship had the *"control* over the *custody and delivery"* of the oil, it would have been responsible, as carrier, for all loss of or to it until actually in the consignee's hands. In the present case defendant having had exactly that *"control over the custody and delivery"* of the cheese was responsible for it as a common carrier at the time of its destruction by fire; for Debenham was the consignee of it, and had actually exercised that control.

In the case of *The Asiatic Prince,* 95 Fed. 343, affirmed in 108 Fed. 287, it was also held that delivery to customs officials, at the end of the transit, according to the custom of the port, is good delivery to consignee, as between the carrier and the shipper. Applied to the case at bar, the delivery to the Antwerp customs warehouse by the railway company carrying from Switzerland to Antwerp, would have been good delivery to Debenham and defendant, without actual delivery of the way bill to Debenham, and without any of the positive directions given by him to place the goods in one of several places of his choice. *A fortiori,* the delivery to him and defendant was complete when he gave directions to the government where to place them.

It is to be particularly noted that in Santos, the port of delivery in the "Asiatic Prince", the law was such that on the delivery to the customs officials "responsibility for delivery of the goods * * * *devolves wholly upon the customs authorities."* (108 Fed. 289). Of this the Circuit Court of Appeals said:

> "Such a system, *in which the customs authorities assume the ship's responsibilities as to making true delivery, is contrary to the system prevailing in other ports.* Nevertheless it is not incredible that a government may undertake such functions."

Obviously such a system does not obtain in this jurisdiction (see *United States v. Georgi,* 44 Fed. 255 at 257) and as the agreed statement of facts

shows no such system in Antwerp, it must, of course, be presumed that it did not obtain there. Therefore, in the case of the Asiatic Prince, owing to the peculiar system obtaining at Santos, the customs officials, although they had only the *naked custody* of the goods, were responsible to the shippers or to the consignees, who had the *legal possession* of them. But for that peculiar system the consignees would have been their own insurers. In the present case there was no such responsibility on the customs authorities, but it was exclusively upon the defendant, which had the *legal possession* of the goods.

It is clear, therefore, that the rule as to delivery and acceptance, applied in the above cases to deliveries by carriers to consignees, applies equally to delivery by the shipper to, and acceptance by, the carrier, and *particularly to delivery by a carrier to, and acceptance by, a connecting carrier in a foreign land.*

All such deliveries and acceptances must be according to the laws of the country and the custom and usage of the locality in which they take place.

4. *The goods were warehoused, at the time of their destruction by fire,* SOLELY FOR DEFENDANT'S CONVENIENCE.

Debenham deposited plaintiff's goods in the Entrepot as agent for defendant, and for the pur-

poses of defendant's business. After he had notified the shippers of these goods, and had advertised in the public prints on May 22, that the steamer "Sardinian Prince" would be able to load for Montreal direct, and would sail on June 5th; after he had requested the shippers to send him the goods before June 3rd, and the shippers, acting upon the request, had sent them in accordance with his request, and consigned to him; and after, finally, the goods arrived in Antwerp and the way bill was delivered to him by the railroad officials, he had dominion over the goods. While they were in Belgian territory, *the Belgian Government was interested in them only to the extent of assuring their exportation.* The customs warehouse system is provided in modern states for the convenience of importers, and as the best system to keep importations, or goods in transit, under the surveillance of the Government, while at the same time causing the least amount of inconvenience to the importer. Because the warehousing is done for the benefit of the importer (here Debenham), the expense and risk are borne by the importer:

> "* * * the government does not intend either to hold indefinitely * * * or to take the risk of loss that may attend holding them."
>
> *United States v. Georgi,* 44 Fed. 255, at 257; *The Asiatic Prince,* supra.

The *warehouse charges in this case were paid by Debenham,* and, if the goods had been transported from the warehouse to the steamer, the charges

therefor would have been payable by him. The goods were placed in the warehouse, not by the plaintiff nor by the shipper, *but by Debenham as agent for defendant,* and in the performance of his duty, as Continental Traffic Agent of the Canadian Pacific Railway Company, to receive shipments for the defendant at Antwerp. The Revenue Acts of the United States provide that bonded merchandise deposited by the importer, consignee, or agent in a public warehouse owned or leased by the United States is held "at *his expense and risk*". The agreed statement of facts shows that the law of Belgium is the same as to expense, since the warehouse charges were paid by Debenham; and the presumption, both as to expense and risk, is that the law of Belgium has the same provision. It is quite natural that the Government should be unwilling to assume the risk of goods held in its custody for the benefit and convenience of importers, and quite unnatural that it could be willing to do so (*The Asiatic Prince,* supra). The rule, as to provisions for warehousing, is stated in *12 Cyc.,* 1153, in the following words:

> "As such regulations are obviously for the benefit of the importer, the general trend of the regulations has always been that the *expense and risk must be borne by him*" (Article "Customs Duties").

Debenham, for defendant, ordered them into the warehouse. While there, they were at the expense and risk of defendant. They were placed there

by the general agent of a carrier, *for the convenience of the carrier, and as a mere accessory to their transportation from Antwerp to San Francisco.*

There was never any necessity for any detention *whatever* of the goods in Antwerp, so far as the shipper, the plaintiff or the Belgian Government were concerned. The interest of them all required that the goods should *not* be detained. The detention was necessary only for the convenience of defendant, and, exercising its dominion over the goods, it stopped them *to suit that convenience.*

Even should it be presumed (contrary to fact) that the goods, to the shipper's knowledge, were to remain in Antwerp for any time at all, under the supervision of the customs authorities, it would not follow that they were to remain there *indefinitely,* to suit the business whims of defendant. If there had been any detention contemplated, it could have been only one rendered *necessary for the purposes of the Belgian Government,* and not one rendered *desirable for the convenience of defendant.* At the very most, the shipper could be said to have contemplated that the goods would remain under surveillance only until such time as defendant, in the exercise of its free will, would have *the option of either continuing them thereunder for its convenience, or taking them out of such surveillance for its convenience.* Such option the defendant had as soon as Debenham had ac-

cepted the way bill, on May 30th, and it continued to the time when the goods were destroyed. By ordering the goods to the warehouse, Debenham deliberately exercised that option to suit defendant's private purposes. On June 1, defendant again exercised that option by taking the Acquit de Transit; and thereafter, *after the ship was in,* by delivering the "Acquit de Transit", accepting the "remise au depart", and ordering the goods to the vessel. The defendant, from May 30 to June 5, was continually exercising that option to further its convenience; and *particularly after June 1, when the ship arrived in Antwerp.* From that time on, if not before, the goods remained in the warehouse *exclusively for defendant's convenience,* and contrary to that of shipper, plaintiff and the Belgian Government—merely as an accessory to their carriage to San Francisco.

5. *The goods were* IN THE POSSESSION *of defendant as a common carrier, at the time of their destruction by fire.*

While these goods were in the Entrepot Royal at Antwerp, they remained in the *legal possession* of defendant as carrier. Defendant took possession of them as carrier when the way bill was delivered to its agent Debenham. From that moment defendant had the right to control them as carrier, in accordance with its convenience. When Debenham directed the railroad officials to deposit them in the Entrepot he actually exercised *one of the rights*

implied in possession, viz.: *to delegate their physical custody to one who was better qualified to assume it than he or his principal.* If he then did not retain their physical custody, it was because the interest and convenience of this principal required him not to do so. Whenever it suited the convenience of defendant, the goods could be withdrawn from the physical custody of the Entrepot. Whenever Debenham should notify the officials of the Entrepot "that the vessel which was to receive the shipment was ready to receive and embark the shipment for export from Belgium, * * * it would have been the *duty* of the Belgium customs authorities" to redeliver the physical custody of the goods to defendant. He *ratified and confirmed his possession* by accepting the "Acquit de Transit". He again actually exercised his right of possession, while the goods were in the Entrepot, by taking the preliminary steps of withdrawing them, by securing a "Release for Departure", when it suited the convenience and pleasure of defendant, and ordering the goods to the ship. The *custody* of the Belgian revenue officers has nothing to do with the question whether the defendant had *possession* of the goods as a common carrier while they were in the warehouse. The latter question is one between the defendant and the shipper or owner of the goods. The agreement between plaintiff, as owner of the goods, and defendant as common carrier, and any subordinate arrangement between the shipper, acting for plaintiff, and Debenham, acting for defendant, were neces-

sarily subject to the revenue laws of Belgium and those of every country through which the goods passed on their way from Switzerland to San Francisco. Debenham's acceptance of the goods, at Antwerp, for transportation did not require a delivery to him in contravention of the laws of Belgium, but such a delivery as the laws of Belgium would permit. Any delivery to Debenham in conformity with the laws of Belgium was a good delivery to *defendant*. It was a complete delivery into the possession of defendant if it was as perfect as the laws of Belgium permitted (see authorities under I, B, 3, supra). If, by these laws, Debenham, as defendant's representative, was given power to exercise all rights over the goods, except only the right to have *physical custody* while he chose to detain them in Belgian territory, he held the *possession* of the goods as the agent of the carrier.

Suppose that an agent of defendant had accepted delivery of these goods at Uster in Switzerland for through transportation to San Francisco, but, on their arrival at Antwerp, had found that his ship was delayed and therefore, pending her arrival, had ordered the goods to the Entrepot; could it be seriously contended that the defendant's common law liability was suspended during the period while the goods were detained in the Entrepot for the convenience of defendant?

The fact that the storing of the goods, before defendant was ready to place them on board, was under the supervision of customs inspectors whose

duty it was to see that they were not removed in fraud or evasion of the revenue laws nor taken to places unauthorized by law, did not at all affect the relation of the parties to this action, or their duties and liabilities. The fact that the possession of Debenham, or defendant, as between them and the Belgian Government, was a qualified possession, did not affect the transaction as between defendant and plaintiff. The custom house officials had no authority to take the possession or control of the goods, nor did they take possession or control of them. If defendant's ship was ready to receive them on their arrival at Antwerp Debenham had the right to direct the railroad to take them to his ship at once, and it would have been the *corresponding duty* of the Belgian officials to permit them to be placed on board; in case his ship arrived late, they were still in the *possession and under the direction* of Debenham, subject to the *surveillance* of the Government officials. The time when the supervision of the Government officials would cease and the physical custody of the goods be surrendered to Debenham and to defendant *depended exclusively upon the pleasure and convenience of Debenham and defendant*. That the supervision of the Government was at all required, and that the goods were at all placed in the physical custody of the customs officers, *was due to the voluntary and deliberate act of Debenham and was the result of the convenience of defendant*. Had Debenham directed the officials, an hour before the fire started in the public ware-

house, to remove the goods therefrom and take them down to the "Sardinian Prince", *which then had been in port for four days and actually engaged in loading for two days,* it would have been their duty to take them away. The customs officers had no legal right to refuse physical delivery to Debenham one hour before the fire destroyed them. The extent and limit of the powers of the customs officers was to oversee the disposition by Debenham and defendant only so far as essential to prevent frauds upon the Belgian revenues. As between plaintiff and defendant, the goods were delivered to Debenham and to the Canadian Pacific Railway Company when Debenham, on May 30, was in a position to place them in his ship or, in the alternative, to direct their movements in accordance with the business convenience of the defendant common carrier. Clearly these goods would have been far from the Entrepot Royal at the time of the fire, *if defendant's business convenience had not confined them there,* contrary to what plaintiff was justified in expecting after the notice sent to the shipper, and published in the Antwerp paper. The goods were in the warehouse, temporarily, by order of the carrier and solely for the convenience of the carrier, and accessory to the voyage for which they were intended.

While the goods were in the warehouse, the customs authorities had *custody in fact,* but Debenham, at all times, had the right to exercise control in his own name against the world at large (exclusive, of

course, of their owner). Debenham, though not having actual custody, had the right to possess the goods. He had *possession in law,* and the customs authorities held the mere *physical custody* or *possession in fact.* Debenham did not lose the *right of possession in fact; he did not lose the right of possession* merely by delegating the physical control; his active control was, at any moment, capable of being enforced as a matter of legal right. He had a right to recover de facto possession whenever defendant was ready to take the goods. In fact the customs authorities, while the goods were temporarily in the country, claimed not even the absolute physical custody of them, but only a *supervision,* or such qualified custody as was necessary to assure either their exportation, or else payment of import duties in case they remained in the country. Debenham could have detained them on his own wharf, there to remain until such time as he should direct them to be placed on board his ship; had it been convenient for him to order them to the wharf, they would have been under the supervision or surveillance of Belgian customs officials, but practically and effectively in his own actual or physical possession. Or, by electing to pay the duties, he could, at any time, secure physical possession of the shipment, free of all supervision.

When the goods had arrived in Antwerp, and the way bill was delivered to Debenham, the previous carrier had made to him such transfer of control in fact as the nature of the transaction admitted.

Had he been the buyer of the goods, it would then have been too late to stop them *in transitu. He took possession for defendant as carrier,* and positively exercised his *jus dispondendi* by sending the goods to the Entrepot for temporary convenience. He had, as it were, the key to the warehouse and could enter and remove the goods to his ship whenever he pleased. It is not necessary to say that he, under the circumstances, had *actual physical possession* of them; but such a view was adopted by Pollock, C. B., in the case of *Gough v. Everard,* 2 H. & C. 1 (1863). In that case Everard had sold to plaintiff timber lying upon a private wharf belonging to Everard; afterwards the seller became bankrupt. After the sale the buyer obtained the key to the wharf, and the question as to possession of the timber arose. Pollock, C. B., said:

> "The whole of the timber lying at the private wharf was sold to the plaintiff, and the key gave him *the actual possession* of it * * * the key of the wharf had been delivered to him, and he had *manual control* over the timber. The court takes the view that the buyer had as much possession as he could have with regard to the nature of the subject-matter, and that this was a real *de facto possession.*" (Case discussed in *Pollock & Wright, on Possession,* p. 65.)

Quotation marks should appear in the indented passage, as follows:

1. After the word "it", in line 3;
2. Before the words "the key", in line 3;
3. After the word "timber", in line 5;
4. None should appear after the word "possession" in the last line.

The passage quoted from Pollock & Wright's Ess
on Possession is to be found at page 129 there

manner in the famous *Essay on Possession,* by Pollock & Wright, above cited.

The test of possession is there stated in the following proposition:

> "When a person who has the possession of a thing delivers it to * * * a second person, and the question arises whether the second person *has thereby acquired the possession,* the answer will depend principally, on whether the first person *intended to part with the possession and to transfer a separate and individual and exclusive control for the time being* to the second person."

Applying this test to the case at bar, we reach the following results:

(a) *As between the shipper and Debenham:* The shipper certainly intended to part with the possession and to transfer to defendant a separate and undivided and exclusive control of the goods during the period of their carriage from Antwerp to San Francisco; hence defendant acquired the possession thereof as bailee and common carrier.

(b) *As between Debenham and the Entrepot:* Debenham did not intend to part with the possession, and did not intend to transfer to the Entrepot a separate or undivided or exclusive control for any time. On the contrary, he intended to retain control of the goods

> *exclusively in himself* and to withdraw them from the warehouse at any time in accordance with his own pleasure and convenience; hence the Entrepot did not acquire possession thereof.

A case in which the Government authorities have more perfect control of the thing in its charge than the customs officers have while goods are in the public warehouse is the case of officers of the post office. Yet:

> "An officer of the Post Office seems not as such to be a bailee of * * * things in his charge, but to be merely a *custodian* for (and in a position similar to that of a servant of) the sender."
>
> *Pollock & Wright, Possession,* p. 164.

In fact the control which the law gives the revenue officers over foreign merchandise brought into a country has nothing to do with the contract between the carrier and the consignee or owner of the goods. The promise of the carrier to receive the goods at Antwerp was necessarily subject to the revenue laws of Belgium and every country through which the goods passed in transit, and plaintiff's obligation to Debenham did not require a delivery to him as consignee in contravention of these laws, but only as these laws permitted. Debenham obtained a permit to keep these goods temporarily at Antwerp, and to remove them, for the convenience of defendant, to the Entrepot Royal. That this removal was under the supervision of customs officers, whose duty it was

to see that the goods were not removed in fraud or evasion of the revenue laws of Belgium, or taken to places not authorized by law, did not at all affect the relation of the owner of the goods and defendant, or their duties or liabilities. The fact that Debenham's possession of the goods, as between him and the Belgian Government, was a qualified possession, did not affect the transaction with plaintiff. As between him and plaintiff he had such possession of the goods as made defendant responsible to plaintiff as a common carrier. *The custom house officers could not delay, prevent or interfere with the physical delivery of the goods to Debenham or his ship whenever defendant was ready to demand it.* The extent and limit of the powers of the custom house officers was to direct the mode of delivery so far as essential to prevent frauds upon the revenues of Belgium. The delivery of the goods to Debenham as agent for defendant carrier was a transaction with plaintiff, or plaintiff's shippers at Switzerland, and not with the Belgium authorities.

In *The Seguranca,* 68 Fed. 1014, and in *The Asiatic Prince,* 95 Fed. 1343; 108 Fed. 287, it was held that delivery to custom house officials, at the end of the transit, according to the custom of the port, is a good delivery by the carrier. Applied to the case at bar, the delivery into the Antwerp Custom House by the railroad company carrying from Switzerland to Antwerp would have been a good delivery to Debenham and defendant with-

out actual delivery of the way bill to Debenham and without the positive directions given by him to place the goods in one of several places of his choice. *A fortiori* the delivery to him and defendant was complete when he accepted the way bill and gave directions to the Government where to place them.

As pointed out, supra (II, B, 3), Judge Brown, in *The Seguranca,* clearly recognized the distinction between *legal possession* and mere *physical custody,* and practically defines legal possession as the *"control over the custody or delivery".* The authorities cited by defendant, as heretofore noted, are also careful to mention the distinction, and it is noted in the case above quoted, of *St. Louis etc. Ry. v. Commercial Ins. Co.,* 139 U. S. 223.

Referring to defendant's brief, pages 20 and 21, it is submitted that there was never any "exclusion of control" over the goods by the customs authorities. The defendant had the various options before mentioned, and could ship the goods when and where it pleased, without paying any duties, and without any objection by the Belgian Government. Or, even if it should be conceded that there was ever such an exclusion of defendant's control, *that exclusion was voluntarily created by defendant for its own purposes and wholly unnecessary.* It cannot be said of these goods that they were ever "withheld from the control" of

defendant; *for defendant had at all times, and exercised control over them.* Debenham was always "at liberty to take possession of them", but he preferred not to exercise that liberty until it was more convenient for defendant to so do.

We cannot see that the case of *Hartranft v. Oliver,* 125 U. S. 525, cited in defendant's brief, page 20, is in any way in point on any of the issues of law or fact presented here.

Referring to the quotation from *Hutchinson,* Sec. 755 (defendant's brief, page 21), we submit that it does not apply to this case. As said heretofore, the shippers can only be presumed at the most to have contracted with "knowledge of the *necessity* of customs detention and inspection" when that necessity was for the *benefit of the Government;* they did not contemplate or anticipate any detention under the supervision of customs authorities or otherwise for the *benefit or convenience of the defendant.* The shippers had here made every "provision for the passage of the goods beyond the borders of foreign territory;" they had nothing further to do. All remaining steps were in the defendant's hands. The defendant was *not* here "wholly powerless to prevent seizure and detention", but, on the contrary, *had the power to—at once and any moment—prevent any detention.* It did not exercise that power for the sole reason that it suited its convenience better not to so do.

Furthermore, careful investigation shows that the two cases (*Parker v. Steamship Co.,* 76 N. Y. Supp. 806; *Howell v. Railway Co.,* 36 N. Y. Supp. 544) upon which the quotation from *Hutchinson* is based, and which constitute its sole authority, present problems entirely different from those here involved; and the words *"either in transit"* are founded upon a bare dictum in the former. So far as they apply here at all, these two cases are favorable to the plaintiff. The case of *Pennsylvania Company v. Canadian Pac. Ry.,* 107 Ill. App. 386, cited under the same section of *Hutchinson,* is conclusive in favor of the present plaintiff's contentions. These cases will be found considered in relation to, and distinguished from, the case at bar in Appendices C, D and E, respectively.

The quotation from *Moore,* defendant's brief, page 32, has been sufficiently considered above. The excerpt from *Hartranft v. Oliver,* defendant's brief, page 32, is not relevant here; but, so far as it may be applied at all, it is in plaintiff's favor, since it is said that "goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law *when he is at liberty to take possession of them".* The goods in the case at bar were never withheld from the control of Debenham; he had and exercised his control over them continuously. *He was always, afer the goods arrived at Antwerp, "at liberty to take possession of them".* Also, in the present case, a permit—the "remise au depart"—

had been issued, whereas in the *Hartranft* case it had not.

We cannot see how it can be said that "the shipment was * * * forcibly detained by the Government, as asserted in defendant's brief, page 33. *The Government had no reason for detaining it, and did not, in fact, detain it.* The Government would lawfully deliver it at any time, at any place, in accordance with defendant's instructions. Defendant was not only in a position "to induce the Governmental authorities to deliver the shipment * * * *in due time"*; he was in a position to *command* the Governmental authorities to deliver the shipment *at any time desired.*

The reasons lying at the foundation of the insurer's liability, to which a common carrier of goods for hire is subject, are substantially as stated in the authorities in defendant's brief, pages 34 to 37. But to say that those reasons fail when applied to the case at bar is a fallacious statement. It is also a fallacy to suppose that transportation in bond is a particularly modern device. This case is not a novel case; it requires no change of the existing law, and the old reasons apply fully to it. The case of *Schieffelin v. Harvey,* 6 Johns. (N. Y.) 170; 5 Am. Dec. 206 (Appendix F) refutes the theories of defendant in these respects, *since it is there expressly reasoned that the danger of collusion between carrier and customs officers is such that the carrier is under his usual insurer's liability while the goods are in the custody of those*

officers. We particularly commend the case cited to the court's attention as being remarkably like that presented at bar. Also in the case of *C. & N. W. R. R. Co. v. Sawyer,* 69 Ill. 285, a carrier was held to an insurer's liability for the destruction of *bonded goods,* in its hands, by fire.

In concluding this division, we respectfully submit that the case at bar presents no complex or unprecedented question, and requires only the application of well defined and established principles. Such was the view of the learned judge of the District Court, who said in his well considered oral opinion (pp. 29-30):

> "I am entirely satisfied, under the authorities, that the possession, so far as the consignor is concerned, had been completely delivered into the hands of the defendant. * * * and it seems to me that there can be no question that under the law the liability of the defendant was complete as that of a common carrier."

C. THE MEASURE OF DEFENDANT'S LIABILITY.

1. *The rule.*

It is not denied by defendant, and it is well settled, that the measure of damages for loss of goods by a common carrier is the market value of the goods at the destination to which he undertook to carry them, at the time and in the condition in which they should have been there delivered, together with interest on such amount from such time.

Such is the rule in the federal courts and in the State of California:

Mobile etc. Ry. v. Jurey, 111 U. S. 584;
New York Ry. v. Estile, 147 U. S. 591;
Northern Comm. Co. v. Lindblom, 162 Fed. 250 (9th Circuit);
The Arctic Bird, 109 Fed. 167 (N. Dist. Cal.) (defendant's brief, p. 46);
The Nith, 36 Fed. 86 (defendant's brief, p. 46);
California Civil Code, Secs. 3316-3317;
Ringold v. Haven, 1 Cal. 108 (defendant's brief, p. 45);
Hutchinson on Carriers, Sec. 1360;
Moore on Carriers, 1st Ed., pp. 398-400.

2. *Defendant's alleged exception to the rule.*

The defendant, however, contends (but not positively) that the rule is different if goods are lost before the carrier's ship has left port or commenced its voyage, in which case it is asserted that the measure of damages is the value of the goods at the *port of departure* and not at the *port of destination.*

The cases relied upon by defendant in support of its contention are all to be found in *Moore on Carriers,* 1st edition, page 401, note 9, where they are cited in support of the proposition that, *where special circumstances so require,* the market value at the place of shipment may be taken, instead of at the place of destination. Mr. Hutchinson,

in his work on carriers, evidently doubted the existence of such an exception to the general rule, as is apparent from his consideration of the same cases (*Hutchinson,* Sec. 1360, pp. 1611-1612, Note.)

The only case which is cited by defendant as directly supporting its contention is *Lakemann v. Grinnell,* 5 Bosw. 625. It is to be remarked that that case was decided in the year *1859*, by a *Superior Court of the City of New York*, and is not an authority of any weight, particularly in a federal court. Of the other cases cited in support of defendant's contention, Hutchinson says "this *was said* to be the rule laid down" in them. The case of *Wheelright v. Beers,* 2 Hill's Sup. Ct. R. 391, is an authority of no weight, and is not in point in the present instance. Nor was it in point on the situation presented in *Lakemann v. Grinnell,* where it is cited.

The only federal case cited is that of *Dusar v. Murgatroyd,* 1 Wash. (U. S.) 13. It was decided in the Circuit Court for the District of Pennsylvania in the year 1903, and *the only* language in the case relating to the measure of damages is the following:

> "The profit which might have been obtained, if the sugar had gone safely to Hamburg, was claimed at the opening, but was properly abandoned by the concluding counsel. The difference between the prime cost and charges, and the sales here, forms a fair measure for the damages sustained (8 Fed. Cas. No. 4199, p. 142)."

No authority was cited in support of such a measure of damages, and no reasons were given for it. So far as appears the learned judge was under an erroneous impression as to the general rule mentioned above.

It is true that defendant's liability would not be affected by *private contracts* between the consignee (Wieland) and third parties for the sale of the goods; for the liability of a common carrier is not affected by the result of such *speculation* by the consignees.

> *The Compta,* 6 Fed. Cas. No. 3070 (N. Dist. Cal.).

Interest is given in lieu of such speculative profits:

> *Northern Commercial Co. v. Lindblom,* 162 Fed. 250 (9th Circuit).

But if the court, in the *Dusar* case, meant that the *market value* at the port of destination was not to be considered, it is submitted that it erred in declaring the law. In any event, in 1848, after a careful consideration of a case *in which a vessel capsized at her port of departure,* and destroyed her cargo, Judge Betts, in *The Joshua Barker,* 13 Fed. Cas. No. 7547, held that the owners of the cargo were entitled to recover its value *at the port of destination,* deducting freight and charges, and adding interest on the balance.

The Joshua Barker was cited with approval in *The Arctic Bird,* supra, which was a case decided,

upon a full consideration, by Judge DeHaven, in the District Court in 1901, and followed, in 1908, in *Northern Commercial Co. v. Lindblom* by this court. We respectfully refer the court to the quotation from this case in libelant's brief, page 46, as being a sound and clear exposition of the rule to be followed here.

Whatever the law of the State of New York, upon this point, may be, the law in this district is settled by the above decisions. The rule there laid down is entirely in accord with reason and common sense. Also San Francisco being the place where the contract was made, also the place of performance, and the *forum,* as well, the rule stated in sections 3316-3317 of the Civil Code of this State, governs beyond a doubt.

But *Lakemann v. Grinnell* is distinguishable from the case at bar; for there the *vessel* upon which the goods were destroyed *was destroyed with them* at the port of departure. Here the vessel *was not destroyed* and, presumably, completed her voyage to Montreal. There the voyage of the vessel, as well as of the goods, ended at the port of departure, and the means of performance there failed. This difference is noted in the *Lakemann* case (p. 640) in the attempt to distinguish it from the *Joshua Barker,* in which the circumstances were upon all fours with those in the case at bar.

Furthermore, it cannot be assumed in the present case that the plaintiff could have "procured other

goods on that day (i. e., June 5, 1901) or within a reasonable time afterward, of the same quantity and at the same price" (*Lakemann v. Grinnell,* defendant's brief, pp. 43-44) as those lost. It is submitted that the New York court had no right to make the assumptions in the *Lakemann* case which it did, as the assumed facts, if material, should have been proved by the defendant as an affirmative defense. To make such an assumption here, as to the possibility of procuring like goods in a *foreign country,* on the same day or within a reasonable time thereafter, as to transporting them over several *foreign railways,* and as to procuring transportation for them from a *foreign country* to a port in another *foreign country,* is impossible. This court cannot say that these goods could have been immediately or at all replaced at the same, or any, price, and sent forward by another vessel; and hence cannot in any event follow the *Lakemann* case.

3. *The justice and reason of the rule.*

> "Its *justice* is apparent when the owner of the goods himself is to take them at their destination, there to use or to sell them on his own account."
>
> *Hutchinson, Carriers,* 3rd. Ed., Sec. 1361.

> "The *object* of the law is to make the party as nearly whole as possible for the damages sustained."
>
> *The Lillie Hamilton,* 18 Fed. 327.

Ordinarily, when goods are lost by a carrier, the consignee is damaged to precisely the same extent

whether they are lost at one point or another in the transit. The question is not what *hardship* the carrier sustains, but what *damage* the consignee suffers. To have different rules for losses at different stages of the same voyage would lead to endless confusion.

4. *Defendant's alleged exception to the rule is not here applicable.*

Even did defendant's asserted exception exist, it would not be applicable to the case at bar, for the reason that the goods here in issue were not destroyed at the *commencement* of the transit, but thereafter, and at an *intermediate* point therein. For, as pointed out in the first division of this brief, *the delivery to the defendant took place on May 30, 1901,* when the way bill was delivered to Debenham and he directed the goods to be placed in the Entrepot Royal. *They were not destroyed by fire until June 5, 1901.* Therefore, at the time of their destruction *they had been in transit for six days.* Not only had they been in transit in point of time, but they had been in transit in point of location and distance; *for they had been carried in fact by defendant from the place where they were deposited when Debenham received the way bill and gave instructions to place them in the Entrepot Royal, to the Entrepot Royal.* They commenced their voyage at the point where they were deposited when the way bill was delivered and Debenham gave his directions; that was, as to them, "the port of departure". From that point they voyaged to *an intermediate*

point in the entire transit, to wit, the Entrepot Royal; and while at that point, still in contemplation of law, in transit and voyaging toward their destination, they were destroyed. These facts present a case for the application of the general and, we submit, the only rule as to the measure of damages. The case would not be within the alleged exception to the rule, even if the existence of such an exception were to be admitted.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed in all particulars, with costs of this appeal to the defendant in error.

Dated, San Francisco,
May 24, 1915.

Respectfully submitted,

LOUIS T. HENGSTLER,
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Index to Appendix.

APPENDIX.

A.

SOUTHERN RAILWAY CO v. HUBBARD BROS., 146 Fed. 31.

The defendant railway company contracted with a compress company that the latter should receive cotton, compress it, and load it upon cars of the defendant *as directed by defendant;* the compress company to be liable for any loss of or damage to cotton while in its possession, *fire excepted.* Smith and Coughlan shipped at Nettleton, Miss., on the K. C. M. & B. Ry. 100 bales of cotton consigned to plaintiffs in New York over said railway and connecting carriers. The defendant railway company was one of such connecting carriers. The bill of lading restricted the liability of each successive carrier to damage or loss due to its own fault only.

The cotton was carried over the K. C. M. & B. Ry. and the Belt Ry., and by the latter *delivered to the compress company. That was the last trace of the cotton.* The compress company never delivered it to the defendant, but *the K. C. M. & B. Ry. notified the defendant of the delivery to the compress company and the receipt of the compress company for it was handed to defendant.*

The plaintiff at first proceeded against all three railroads, but on proof of the above facts confined its suit to the defendant. The defendant's

liability depended upon *whether or not a delivery of the cotton had been made to defendant as a common carrier.* To establish that such was the case the plaintiffs relied on the contract between defendant and the compress company and also upon *the custom of the K. C. M. & B. Ry. to make deliveries to the compress company for forwarding on defendant's railway.* The cause was submitted to the jury and a verdict was rendered for plaintiff. A reversal of the judgment thereon entered was prayed, but the judgment was *affirmed.*

The Circuit Court of Appeals, through Severens, J., speaking of the contract between defendant and the compress company said that it was not necessary to consider whether it alone justified the judgment,

> "* * * for there was other evidence from which the jury might have found that *the employment of the compress company was for the purpose of facilitating the transportation by reducing the bulk of the cotton, and was an expedient whereby the railway company could more easily earn the stipulated freight than if it should transport it in its larger bulk. If it was done for the convenience of the railway company, or mainly for its convenience, it surely would not be unreasonable to find that during the time while the compress company had the possession it was holding it as agent or employe' of the railway company.*" (p. 35.)

The K. C. M. & B. Ry. corresponds to the Belgian State Railway in the present case; the defendant there corresponds to the defendant here;

the compress company corresponds to the customs authorities.

The case at bar is stronger than the case cited; for there the K. C. M. & B. Ry. *merely notified* the defendant of the delivery to the compress company and handed to the defendant the latter's receipt. The defendant did not give any direction as to, or exercise any control over, the cotton. In the present case, however, not only was the defendant *notified* of the arrival of the goods in Antwerp, and *placed in possession of the way bill* (on May 30, 1901), *but the defendant actually exercised full control and direction over them,* and paid the warehouse charges on them.

In the case cited the *physical custody* of the goods was in the compress company, and it was to load them upon the defendant's cars *when and where directed or instructed* by the defendant (Report, page 33, lines 1-3). The defendant there had the *legal possession, the jus disponendi,* through the notice and the receipt, and *although it never exercised its jus disponendi,* it was held responsible as a common carrier for the non-negligent loss of the goods. In the case at bar the *physical custody* of the goods was in the customs authorities; they were to load them upon the defendant's ship *when and where directed and instructed by defendant.* The defendant had the *legal possession;* it directed the *physical custody* to be placed with the Entrepot Royal; and it retained the *jus*

disponendi while the goods were detained for its convenience in the Entrepot. The defendant *actually exercised its jus disponendi* by directing the officials to take the goods to the Entrepot Royal, its ship not being ready to receive them, by later directing them to the wharf and by paying the warehouse charges. These facts rendered defendant responsible as a common carrier for the destruction of the goods by fire.

In the case cited the cotton was delivered to the compress company *for or mainly for the convenience of defendant.* In this case the goods were placed in the Entrepot Royal *solely* for the convenience of the defendant; the shippers were in no possible manner benefited thereby, and it was contrary to the reasonable expectations which they had a right to entertain after defendant's notice and advertisement.

In the case cited the defendant had the option: (1) to place the cotton directly on its cars; or (2) to have it delivered to the compress company. In the case at bar the defendant had the option: (1) To passively leave the goods in the former carrier's hands; (2) to place the goods directly on its ship; (3) to have them delivered to the Entrepot Royal; (4) to have them placed on the wharf, from which they were to be loaded on the ship; or (5) to pay the duty on them and remove them entirely from customs surveillance. And there can be no doubt that the defendant

could have placed around the goods, either at the wharf, or at the Entrepot Royal, every precaution against loss or damage which it chose to take. It could have stationed its agents at or about either place, without in any manner interfering with the naked physical custody or surveillance of the customs officials. There was no "exclusion or control" over them as to the defendant, *even with reference to their physical custody,* much less their legal possession. They were placed in the Entrepot Royal *not for the protection of the Belgian Government,* but solely for the convenience of the defendant; the Belgian Government would have been just as adequately protected, and more so, had the goods been placed on shipboard instead of being detained in the Entrepot Royal.

B.

NORTH GERMAN LLOYD S. S. CO. v. BULLEN, 111 Ill. App. 426 (1903).

The plaintiff purchased in Chicago two tickets for the use of his wife and daughter, entitling them to passage room on the Str. "Kaiser Wilhelm de Grosse" from New York to Southampton. The agent from whom the tickets were purchased delivered with them tags to indicate what was to be placed in the stateroom and what in the hold. "The agent told appellee (plaintiff) that baggage so marked for delivery in the stateroom, and sent direct to the appellant company would be placed in her stateroom, where she would find it, *and that it would be advisable to forward it a few days in advance of the time of sailing.* The trunk in controversy was so tagged and was checked to New York where it arrived the evening of June 27, 1900. By direction of appellee's wife, it was delivered at the docks of the appellant at Hoboken, some time before the evening of June 30, when it was *lost in the fire* which destroyed appellant's docks * * *". It was contended that, as the baggage was delivered to appellant *five days before the time for sailing and two days before it was destroyed by fire,* it was held in storage, and that appellant was not liable as a common carrier for the loss, nor for the damages. Held for the plaintiff. Affirming the judgment of the Circuit Court, the court said:

> "The evidence tends to show that the trunk in question was sent to appellant *in accordance*

with the advice and direction of its agent who delivered the tags furnished by the company for the purpose. It was *in accordance with this evidence and direction that the baggage was sent over and delivered in advance of the time of sailing.* There were in this case *no further acts or instructions required of appellee before putting the trunks in the stateroom on board the ship. The delay in putting them on board was for the convenience of appellant, not of appellee.* The stateroom was its immediate destination, and there, as the event shows, it would have been safe from the fire in which it was lost, and there appellant had undertaken to deliver it in the usual course of business. *It was in appellant's hands, not for storage on its own docks, but for delivery in the stateroom on board its own ship. It is not a case, therefore, where the goods were delayed for the convenience of the owner and where the duty of immediate transportation had not arisen at the time of the loss, as in* (other cases) where the goods had been delivered to the carriers to await further orders from the shippers, and were therefore held to be in the carrier's custody only as warehousemen. As is said in *Barron v. Eldridge,* 100 Mass. 455, 458:

'If, without putting them in transit, the carrier for HIS OWN TEMPORARY CONVENIENCE, *places them in store, still the liability of a carrier attaches.'* ''

We do not deem it necessary to discuss the application of the above case to the facts here involved further than to ask that they be read in connection with Debenham's letters to the shippers of May 17th and 20th, 1901, pages 5 and 6 of the Agreed Statement of Facts.

C.

PENNSYLVANIA CO. v. CANADIAN PAC. RY. CO., 107 Ill. App. 386.

Certain barrels of oil were delivered by the shipper to the Pennsylvania Company, a common carrier, at Cleveland, Ohio, for transportation to Brandon, Canada. The Pennsylvania Company gave to the shipper a bill of lading which set forth that the oil was to be delivered to "G. G. Fortier, Brandon, Manitoba, care Canadian Pacific." The Pennsylvania Company carried the oil to Chicago and there delivered it to the C. M. & St. P. R. R. Co., receiving a receipt which recited that the oil was marked "G. G. Fortier, Brandon, Manitoba, care Canadian Pacific, care C. M. & St. P." The C. M. & St. P. Ry. carried the oil to a point in Minnesota and there handed it over to the St. P., M. & M. Ry. The St. P. M. & M. Ry. carried it to St. Vincent, a point on the boundary line of Canada, where it was bonded over to the Canadian Pacific Ry., and by it receipted for. But, through error, the Canadian Pacific changed the name "Fortier" to "Foster" in its receipt for the oil. Later a second shipment of oil was forwarded in the same manner, and the same error in name was made.

The oil in question was dutiable and when transferred to the Canadian Pacific Ry. on the boundary line of Canada (i. e., at St. Vincent) *"the cars were sealed and tagged* to indicate that the goods were *in bond"* (p. 388). "When the oil arrived at Winnipeg" (after passing the Canadian border) "it was *under the control of the customs officials and*

could not be carried forward until properly entered, cleared and the duties paid'' (p. 388). No one could do this on behalf of the consignees, except themselves or attorneys duly authorized by power of attorney (p. 388). "The *invoice* which accompanied the oil from St. Vincent was, upon arrival of the oil at Winnipeg, *delivered to the customs officials''* (p. 389). It was the custom of merchants west of Winnipeg (and Brandon was in that direction therefrom) to have a customs broker at Winnipeg look after the goods on their arrival at Winnipeg and clear the same (p. 389). *It was not the duty of the Canadian Pacific Ry. to pay the duties upon the goods* (p. 389). "By sufferance, goods were permitted to remain by the customs officials in the yards of the Canadian Pacific Ry. until cleared, for a period generally of not longer than six months, *thus constituting the yards of the company a sufferance warehouse''* (p. 389). "The customs duty upon the oil in question was never paid (p. 389).

The oil arrived in Winnipeg in a leaking condition. There were no addresses on the barrels in either shipment (p. 389). The consignees had never before received oil from the Canadian Pacific Ry. at Brandon. *On arrival of the oil at Winnipeg the Canadian Pacific Ry. mailed notices of that fact to the erroneous names in the said receipts* (p. 389). The warehousing room at Winnipeg was limited and the oil was unloaded and deposited on the ground, where it remained for a time. *The*

Canadian Pacific Ry. made an effort to have the duty paid and the oil removed; but for lack of invoices did not succeed, and to save the oil from total destruction had it hauled some distance by team to a tank of the Imperial Oil Co. and there stored (pp. 390, 389). *"This was done under the permission of the collector"* (of customs) *"and by direction to * * * his subordinate at the station"* (p. 390). Some of the oil leaked out of or was sold from the tank; at any rate, some of it disappeared (p. 392).

The Pennsylvania Company (the initial carrier), was sued by the consignees (p. 391) of the oil, for non-delivery and loss of the oil, and held liable. In this action the Pennsylvania Company seeks to recover from the Canadian Pacific Ry. the amount which it had been compelled to pay to the owners, on the ground that it failed to perform its duty as a common carrier (p. 392). *The error in the consignees' names was due to no fault of the Canadian Pacific Ry.* (p. 391).

The appellate court reversed the lower court and remanded the case. Quoting from *C. & N. W. R. R. Co. v. Sawyer,* 69 Ill. 285, the court said:

> "The carrier received the goods to be transported for hire, *knowing at the time that they were goods subject to duty to the Government.* * * * When the carrier received the goods with this knowledge, *it impliedly undertook that the goods should be safely delivered at the place of their destination in the special manner required,* and within a reasonable time" (p. 394).

The court further said:

> "If, as seems to have been the case, *the governmental power prevented the carriage of the oil to its destination until the duties were paid,* then it was appellee's (Canadian Pacific Ry.) duty to take all practicable means *to notify the consignees, and, failing in that to notify the shippers of the situation. Meanwhile the appellee was at liberty to turn the oil over to the customs officers, or to store it in a suitable and reasonably safe place*" (p. 392).

The court then said that the Canadian Pacific Ry. failed to notify either the consignees or the shippers that the oil was being held at Winnipeg for duty *and breached its duty as a common carrier, rendering itself liable as such.*

In the case at bar the defendant *did not even attempt to notify either the San Francisco consignees or the shipper of the arrival of the goods or that it intended, for its convenience, to place them in the Entrepot Royal for a time before loading.* On the contrary, by its notice to shippers and its advertisements it had led the shippers to believe that the goods *would be in the ship* before the time when fire consumed them in the Entrepot. And had the defendant given *to the shipper the disposal of the goods in the interim,* the shipper might have chosen the wharf instead of the Entrepot Royal, in which case the goods would not have been destroyed. Or, even had the shipper, after such notice, directed the goods to be placed in the Entrepot Royal, the shipper would have had

the *opportunity to procure insurance against loss by fire while therein, as it would have done without doubt had it not supposed that the goods were insured sufficiently after arrival in Antwerp by the defendant in its capacity as common carrier.* But the defendant did not notify the shipper of the interruption of the transportation of the goods, due to the defendant's own convenience, and so did not afford the shipper the election of how or where to dispose of or protect the goods in the interim; on the contrary, the defendant took them under its exclusive control, and *exercised its own option, its jus disponendi, by placing them in the Entrepot Royal.* This very act is conclusive proof that the shipper had no further control of the goods, either in fact or in the contemplation of the defendant.

The government power prevented the carriage of the goods in the Illinois case just as in the present case, until the moment arrived when either the duties were paid or they were embarked by the carrier for export. That moment, in both cases, depended upon the exclusive volition of defendant.

D.

PARKER v. NORTH GERMAN LLOYD S. S. CO., 76 N. Y. Supp. 806.

The facts were that the plaintiff had travelled from New York to Germany on defendant's steamer. After arrival at Bremen, the trunks of plaintiff, being there in defendant's baggage room, defendant's agents gave plaintiff, who desired them forwarded to an interior town in England, a receipt for "two trunks for transfer by slow freight to * * * Hove-Brighton". The agent forwarded them in the usual way, and after their arrival in England they were detained in the customs house, where they were destroyed by fire.

It was held that the defendant was not liable for the loss. The ground for the decision was that the transportation of the trunks *by defendant was ended on their arrival at Bremen;* and the contract to "*transfer* by slow freight" to an interior point in England *was not a contract of the defendant for carriage, but only a contract to forward, not placing a common carrier's responsibility on defendant.*

By way of *dictum,* the court cited *Howell v. Grand Trunk Ry.,* and said that, "the reasoning applies to the case at bar, and is equally applicable when the fire occurs in transit as when it occurs in the customs house at the place of destination".

As pointed out in Appendix E, there had been a delivery in the Howell case, to the customs authorities, of both *possession and custody—a delivery,*

leaving no jus disponendi in the defendant; so the learned judge is not correct, in the Parker case, in saying that the reasoning of that case applies equally to the case before him, unless it is because there was also such a delivery by the North German Lloyd to the English customs officers. If there *was* such a delivery, then the Parker case is distinct from the case at bar for the reasons enumerated under the Howell case, above. In any event, in the Parker case there was, when the goods were destroyed in the customs house, *neither possession nor custody nor control* in the defendant as a common carrier, *because it was not a common carrier* as to the trunks between Germany and England. Nor did it have any *jus disponendi,* or control whatsoever over the trunks.

E.

HOWELL v. GRAND TRUNK RY., 36 N. Y. Supp. 544.

The facts were as follows: The plaintiff purchased a ticket from defendant railway from Blythe, Canada, to Suspension Bridge, New York, and obtained leave to stop over until next day at an intermediate station. He also requested that his baggage be unloaded there, *but this was not assented to,* and it was carried through to the point of destination (Suspension Bridge), where, pursuant to law, it was taken in charge by the U. S. customs officers. It there remained "in the *possession and custody*" of the customs authorities until destroyed by fire.

It was held that the defendant was not liable for the loss. The defendant was not, under the circumstances of the case, obligated to unload the baggage at the intermediate station. "The baggage was taken into the *possession* of the customs officers of the United States * * * and remained in the *possession and custody* of those officers * * * at the time of the loss by fire which destroyed the building in which the baggage then was. The baggage was not in the *possession or under the control of the defendant* at the time of the loss; *nor was it in any sense the fault of the defendant that it was not so.*"

Thus the court clearly recognizes the distinction between legal possession and physical custody, and bases its decision, correctly, upon the fact that at the time of the fire, there had been *a delivery by the* carrier putting BOTH *the legal possession* AND *the*

physical custody out of its hands. The carrier, obviously, had no further control of any kind over the goods—*no option by which it could choose the place of deposit during the possession of the customs authorities, and no option by the exercise of which it could remove the goods wholly from any connection with the customs officials.* It had no *jus disponendi* over the goods, nor any connection whatever with them. It was as if they had been delivered to the consignee or owner. It is a wholly different case from the present. And, further, the detention was clearly *for the purposes of the U. S. Government, and not for the convenience of the carrier,* as it was in the present cause.

F.

SCHIEFFELIN v. HARVEY, 6 Johns. 170; 5 Am. Dec. 206.

Plaintiff shipped nutmegs on board defendant's vessel at New York for London. On the arrival of the vessel at London it was found that the goods could not be landed and delivered to the consignees, being prohibited by the law of England. It was then agreed between the master and the consignees that the goods should remain on the vessel and be returned to plaintiffs "at their own risk". *"All the time the vessel was at London, English custom-house officers were on board, who alone, and the mate, had access to the goods."* On arrival of the vessel at New York a shortage in the nutmegs was found, and plaintiff sued the carrier in assumpsit therefor, alleging that they were stolen while on board defendant's vessel. *The missing nutmegs were in all probability purloined by the custom-house officers, while they were stored in the ship's hold in London* (5 Am. Dec. p. 207). Held: Judgment for plaintiff. The court said:

> "It is, however, insisted, for the defendant, that after the master was prevented from delivering the goods, by reason of their being prohibited articles, he is no longer to be regarded in the light of a common carrier, but as a mere bailee, and so liable for negligence only." (5 Am. Dec., p. 208.)
>
> *"It is said that the nutmegs must have been stolen by the custom-house officers, while they were on board the ship and had access to them in order to prevent them from being smuggled on shore. But this is no excuse. It was the duty of the master to guard against such acci-*

dents; and if he has neglected to do it, or been so unfortunate as not to detect the theft, if one was committed, *he, and not the shipper, must bear the loss. This was one of the risks which he agreed to assume; and he must have known that some persons; in all probability, would be stationed on board, to guard against any attempt to run the goods, because such a precaution was both reasonable and right. The master was left in full possession of the ship, and his control over her and her cargo, except as it related to the landing of the goods in question, was as complete as if the custom-house officers had not been on board.*

"This distinguishes the present from cases where it has been held, that during the period of detention by captors, as prize, or by the belligerent for adjudication, all the responsibilities of the master and crew are suspended. In such cases the master is temporarily deprived *of his command; but such was not the effect of having the custom-house officers placed on board of this vessel, for purposes altogether different and justifiable. To admit such an excuse as this would be opening the door to all the evils to be apprehended from fraudulent combinations and collusions between the master and the crew and other persons, which it was the policy of the law to prevent."* (5 Am. Dec. 208-9.)